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6
7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE**
8 **NORTHERN MARIANA ISLANDS**

9 **JUNG SOON LEE (deceased), by**
9 **SUNG YOUNG LEE, Personal**
10 **Representative**

Civil Action No. 05-0031

11 **Plaintiff,**
12 **v.**
13 **DONG GUK CORPORATION,**
14 **and DONGBU INSURANCE**
15 **COMPANY, LTD.**

**DEFENDANT DONGBU
INSURANCE COMPANY,
LTD.'S
MOTION FOR SUMMARY
JUDGMENT AND
MEMORANDUM OF LAW**

16 **Defendants.**

17 **MOTION**

18 Defendant Dongbu Insurance Co., Ltd. ("Dongbu") hereby respectfully moves this Court to
19 enter summary judgment in its favor pursuant to Federal Rule of Civil Procedure 56, and for such other
20 and further relief to which Dongbu is entitled under law or in equity.

22 In support thereof, Dongbu submits the following memorandum of law and the accompanying
23 declaration of Ms. Tamara L. Hunter, which are both incorporated herein by reference as if set forth in
24 full.

MEMORANDUM OF LAW

I. Introduction.

This is a personal injury action in which Dongbu is named as a co-defendant with its insured, Defendant Dong Guk Corporation (“DGC”).

Plaintiff Jung Soon Lee (deceased), by Sung Young Lee, personal representative (“Plaintiff”) alleges that DGC served alcoholic beverages after hours to apparently intoxicated customers at DGC’s restaurant, and that as a result, Jung Soon Lee was killed in automobile accident several hours later.

Pursuant to the stipulation of Plaintiff and DGC, a First Amended Complaint (“Amended Complaint”) was filed in which Dongbu was named as a co-defendant with its insured, DGC, under the Commonwealth of the Northern Mariana Islands (“CNMI”) direct action statute at 7 CMC § 7502(e).¹ No other claims are made against Dongbu besides the direct action claim. As such, Dongbu can only be liable to Plaintiff or to its insured, DGC, if there is coverage under the applicable policy for the claims brought in this lawsuit.

There is no coverage under the policy as a matter of law. The claims arise exclusively out of the serving of alcoholic beverages, and the applicable general liability insurance policy expressly excludes any claims in connection with the serving of alcoholic beverages (such exclusions are known as “dram shop” exclusions). Therefore, Dongbu is entitled to entry of judgment in its favor on Plaintiff’s direct action claim against Dongbu, and on Dongbu’s cross claim against DGC for a

¹ Prior to its amendment pursuant to P.L. 14-39, effective October 26, 2004 (the accident made the basis of this lawsuit is alleged to have occurred on August 2, 2004), the direct action statute allowed a plaintiff to file suit directly against a defendant’s insurer, and provided that the insurer was liable to the plaintiff “within the terms and limits of the policy.” 4 CMC § 7502(e).

declaration that there is no coverage under the policy.

II. Facts.

Since this is an insurance coverage matter, the undisputed facts can be broken down into two sets of facts: one summarizing the allegations in the complaint, and the other setting forth the relevant terms and conditions in the insurance policy.

First, the Amended Complaint *alleges*:

1. Paragraphs 1 through 4 of the Amended Complaint address jurisdiction, venue and the parties. Paragraph 5 incorporates by reference the preceding paragraphs.

2. DGC operates a restaurant in Chalan Kanoa known as Seafood House/Han Kuk Ban Jeon restaurant (the "restaurant") that serves alcoholic beverages. Amended Complaint, Paragraph 6. DGC is licensed to serve alcoholic beverages. Amended Complaint, Paragraph 12.

3. In the early morning hours of August 2, 2004, Jung Soon Lee, Gyu Jin Kim and other students (the "students") from the Northern Marianas College were at the restaurant as customers. Amended Complaint, Paragraphs 7-8.

4. DGC kept the restaurant open and served the students alcoholic beverages between 1:00 a.m. and 3:00 a.m. Amended Complaint, Paragraph 9.

5. DGC served the alcoholic beverages even though it knew that Gyu Jin Kim was visibly intoxicated. Amended Complaint, Paragraph 10.

6. Gyu Jin Kim later drove a vehicle in which Lee Jung Soon was his passenger, and as a result of his intoxication, he was in an automobile accident in which Lee Jung Soon was tragically killed. Amended Complaint, Paragraph 11.

7. DGC served the customers in violation of 4 CMC § 5554 by serving alcoholic beverages

1 after 2:00 a.m. Amended Complaint, Paragraph 13.

2 8. DGC has a duty to stop serving alcoholic beverages by 2:00 a.m. Amended Complaint,
3 Paragraph 14.

4 9. DGC has a duty to deny service of alcoholic beverages to apparently intoxicated customers.
5 Amended Complaint, Paragraph 15.

6 10. DGC has a duty to ensure that its customers are “safe in the premises.” Amended
7 Complaint, Paragraph 16.

8 11. DGC has a duty “not to create a dangerous condition” for its customers. Amended
9 Complaint, Paragraph 17.

10 12. The police report indicates that Gyu Jin Kim operated the vehicle under the influence of
11 alcohol. Amended Complaint, Paragraph 18.

12 13. Serving alcoholic beverages apparently intoxicated customers breaches the duty of care and
13 violates 4 CMC § 5558. Amended Complaint, Paragraph 19.

14 14. Paragraph 20 of the Amended Complaint sums up how the foregoing facts violate the
15 statutes and legal duties referenced above.

16 15. Paragraphs 21-23 of the Amended Complaint set forth the direct action claim against
17 Dongbu.

18 The foregoing are the only allegations in the Amended Complaint. Notably, the original
19 complaint did not contain any allegations regarding keeping customers “safe in the premises,” or any
20 reference to a duty “not to create a dangerous condition.” Instead, those two allegations (Amended
21 Complaint, Paragraphs 16 and 17), were added in the Amended Complaint in an obvious effort to
22 avoid the insurance policy’s dram shop exclusion. Tellingly, however, there are no allegations
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anywhere of any allegedly dangerous condition or unsafe condition at the restaurant *other* than the
alleged serving of alcoholic beverages (the legal significance of this is discussed below).

Second, the material facts regarding the applicable insurance policy are also undisputed.

1. Effective June 4, 2004, Dongbu issued a renewal of an insurance policy with named insureds
DGC and Mr. Han, Kook Ban Jun (“Mr. Han”), and with policy No. KBO-00051-S01 (the “Policy”).
The Policy term was from June 4, 2004 through June 3, 2005. *See* Dongbu’s February 21, 2007 First
Amended Answer and Defenses to First Amended Complaint and Cross Claim, Paragraph 5
(hereinafter referenced as “Dongbu Cross Claim, Paragraph ____”), and DGC’s Answer to Cross-Claim,
Paragraph 1 (hereinafter referenced as “DGC Answer, Paragraph ____”), admitting same. *See also,*
generally, a true and correct copy of the Policy, attached as Exhibit A to the Declaration of Ms. Tamara
L. Hunter (the “Hunter Declaration”), which is filed together with this Motion.

2. The Policy is a valid, binding insurance contract between Dongbu, on the one hand, and
DGC and Mr. Han, on the other hand. *See* Dongbu Cross Claim, Paragraph 6 and DGC Answer,
Paragraph 1, admitting same.

3. Dongbu is the insurer under the Policy. *See* Dongbu Cross Claim, Paragraph 7 and DGC
Answer, Paragraph 1, admitting same.

4. DGC and Mr. Han are the named insureds under the Policy. *See* Dongbu Cross Claim,
Paragraph 8 and DGC Answer, Paragraph 1, admitting same.

5. The Policy’s declarations page, issued as part of the June 4, 2004 renewal, identifies the
Policy as a “BUSINESS OWNERS POLICY.” *See* Dongbu Cross Claim, Paragraph 9 and DGC
Answer, Paragraph 1, admitting same.

6. The schedule of the declarations page shows that there are two types of coverage provided.

1 As more particularly stated therein, one is property coverage and the other is liability coverage. *See*
2 Dongbu Cross Claim, Paragraph 10 *and* DGC Answer, Paragraph 1, admitting same.

3 7. The Policy's comprehensive single limit for the liability coverage is \$300,000. *See* Dongbu
4 Cross Claim, Paragraph 11 *and* DGC Answer, Paragraph 1, admitting same.

5 8. The Policy is subject to all lawful terms and conditions in the Policy, including all
6 amendments and endorsements. *See* Dongbu Cross Claim, Paragraph 12 (alleging subject to all terms
7 and conditions) *and* DGC Answer, page 2, third full paragraph, admitting subject to all *lawful* claims.
8

9 9. The Policy has an exclusion that provides:

10 **B. EXCLUSIONS**

11 11. **1. Applicable to Business Liability Coverage.** This insurance does
12 not apply to:

13 c. "Bodily injury" or "property damage" for which any Insured may be
14 held liable by reason of:

- 15 1) Causing or contributing to the intoxication of any person;
16 2) The furnishing of alcoholic beverages to a person under the legal
17 drinking age or under the influence of alcohol; or
18 3) Any statute, ordinance or regulation relating to the sale, gift,
19 distribution or use of alcoholic beverages.

20 20. This exclusion applies only if you are in the business of
21 manufacturing, distributing, selling, serving or furnishing
22 alcoholic beverages.

23 23. *See* the Policy, page 23 (attached as Exhibit A to the Hunter Declaration).

24 24. All of the foregoing facts are undisputed, and they are the only facts material to this insurance
25 coverage dispute.
26

1 **III. Legal standard**

2 Summary judgment is appropriate where there are no material facts in dispute and the movant is
3 entitled to judgment in its favor as a matter of law. Federal Rule of Civil Procedure 56(c). The
4 purpose of summary judgment is to terminate unsupported claims. *Celotex Corp. v. Catrett*, 477 U.S.
5 317, 323-24 (1986). Summary judgment is an integral component of the federal rules. *Id.* at 327.

6 Additionally, “[t]he construction of an insurance policy is a question of law for which summary
7 judgment is particularly appropriate.” *Property-Owners Ins. Co. v. Ted's Tavern, Inc.*, 853 N.E.2d 973,
8 977 (Ind.App. 2006), *citations omitted*.

10 **IV. The claims are specifically excluded by the dram shop exclusion**

11 As set forth above, the Plaintiff claims in the Amended Complaint that DGC served alcoholic
12 beverages: 1) after the statutorily established closing time; and 2) to apparently intoxicated customers.
13 Plaintiff alleges that these actions violated: 1) 4 CMC §5554 (closing time); 2) 4 CMC §5558 (serving
14 apparently intoxicated customers); and 3) the common law standard of care (*i.e.* negligence). Amended
15 Complaint, Paragraphs 13-20.

16 The Policy does not apply to any personal injury claim against DGC where DGC would be
17 liable by reason of:

- 18 1. Contributing to the intoxication of any person;
19 2. The furnishing of alcoholic beverages to a person under the influence of alcohol; or
20 3. Any statute relating to the sale of alcoholic beverages.

21 The Policy, page 23, B. Exclusions, 1(c)(1-3).

22 The exclusions squarely exclude the claims. Plaintiff claims DGC contributed to the
23 intoxication of the customers and served apparently intoxicated persons. Those claims are excluded by
24

1 (c)(1) and (2). Plaintiff claims DGC violated CNMI statutory provisions regarding the sale of
2 alcoholic beverages. Those claims are excluded by 1(c)(3). Plaintiff claims that the way DGC served
3 the alcoholic beverages breached its common law duty of care, caused the premises to be unsafe and
4 created a dangerous condition. Those claims are all made *only* by reason of DGC having contributed to
5 the intoxication of its customers and giving them more drinks when they were apparently intoxicated.
6 Those claims are excluded by 1(c)(1) and (2).

7 The Policy's exclusion, however, only applies if DGC is in "the business of manufacturing,
8 distributing, selling, serving or furnishing alcoholic beverages." The Policy, page 23, B. Exclusions,
9 1(c). That fact is also clearly alleged. Plaintiff alleges that DGC was a restaurant licensed to sell
10 alcoholic beverages. Amended Complaint, Paragraphs 6 (restaurant) and 12 (licensed to sell alcoholic
11 beverages).

12 The analysis should end here. Taking the allegations at face value, the exclusion clearly applies
13 under its plain and ordinary meaning. *Ito v. Macro Energy*, 4 N.M.I. 46, 68 (1993)(just because terms
14 are not defined does not mean that they are ambiguous; terms in an insurance policy will be afforded
15 their plain and obvious meaning). Another court put it this way:
16

17 [A]n insurance policy that is unambiguous must be enforced according to its terms, even
18 those terms that limit an insurer's liability. Thus, we may not extend insurance coverage
19 beyond that provided by the unambiguous language in the contract. Moreover, insurers
20 have the right to limit their coverage of risks and, therefore, their liability by imposing
21 exceptions, conditions, and exclusions. However, to be enforced, these limitations must
22 be clearly expressed and must be consistent with public policy.

23 *Ted's Tavern, Inc.*, 853 N.E.2d at 978, *citation omitted*.

24 Regardless, there has been extensive litigation regarding the precise language in the Policy, and
25 courts have roundly upheld the exclusion.

1 An insured will sometimes claim that it is not in the “business of manufacturing, distributing,
 2 selling, serving or furnishing alcoholic beverages” if liquor sales is only a small part of its business, or
 3 incidental to its operations. Court have repeatedly rejected that idea. *See for example Peerless Ins. Co.*
 4 *v. Disla*, 999 F.Supp. 261 (D.Conn. 1998); *Woodall v. Alfa Mut. Ins. Co.*, 658 So.2d 369 (Alabama
 5 1995); *U.S. Fidelity and Guar. Co. v. Country Club of Johnston County, Inc.*, 458 S.E.2d 734 (N.C.
 6 App. 1995); and see also 9A Couch on Insurance (3rd Ed. 1996), § 129:32.

7 Another approach is that an underlying tort plaintiff will allege that its claims are based in part
 8 on negligent hiring, training and supervising of employees. *See for example Ted's Tavern, Inc.*, 853
 9 N.E.2d at 977. This is similar to what the Plaintiff and DGC have done in this case. On a stipulated
 10 motion, Plaintiff amended the complaint to allege DGC failed to keep the customers “safe in the
 11 premises” and breached its duty “not to create a dangerous condition.” Amended Complaint,
 12 Paragraphs 16 and 17. However, there is no allegation of anything unsafe or dangerous other than the
 13 way DGC is alleged to have served alcoholic beverages. As the *Ted's Tavern* court held:
 14

16 Regardless of the theories of liability a resourceful attorney may fashion from the
 17 circumstances of this case, the allegations within Counts II and IV are general
 18 “rephrasings” of the core negligence claim for causing/contributing to Wickliff’s drunk
Transp. Jt. Agreement, 194 Ill.2d 96, 251 Ill.Dec. 659, 741 N.E.2d 253, 254 (Ill.2000)).
 19 The events outlined in Counts II and IV simply are not wholly independent of
 20 “carelessly and negligently” serving and continuing to serve alcoholic beverages to
 21 Wickliff when the defendants knew or should have known he was intoxicated and soon
 22 thereafter could be driving drunk. To the contrary, the nuisance and the negligent hiring,
 23 training, and supervision are so inextricably intertwined with the underlying negligence
 24 that there is no independent act that would avoid exclusion 2(c). [footnote omitted]
 Hence, while a valiant effort to procure coverage, the creative pleading of Counts II and
 IV cannot hide the reality that the immediate and efficient cause of the injuries was
 drunk driving precipitated by the negligent service of alcohol. As such, exclusion 2(c)
 precludes coverage. Sadly, tragedies resulting from the over-service of alcohol remain
 an all-too-frequent occurrence for our citizens. [footnote omitted] While we recognize
 the horrible loss suffered here, we are not at liberty to extend insurance coverage beyond
 that provided by the unambiguous language in the Policy.

1 *Id.* at 983.

2 *See also Cusenbary v. United States Fidelity and Guar. Co., 37 P.3d 67 (Montana*
3 *2001); and Auto Owners (Mut.) Ins. Co. v. Sugar Creek Memorial Post No. 3976, 123 S.W.3d*
4 *183 (Mo.App. 2003).*

5 The dram shop exclusion bars coverage in this case under its plain and ordinary
6 meaning. The precise language in the Policy has been litigated extensively, and there is a
7 wealth of authority and commentary upholding the exclusion.
8

9 **V. Conclusion**

10 The dram shop exclusion applies squarely and unambiguously to the claims in this case.
11 Dongbu is entitled to summary judgment in its favor on both the Plaintiff's direct action claim against
12 Dongbu and on Dongbu's cross claim against its insured, DGC, for a declaratory judgment that there is
13 no coverage under the Policy.

14 Wherefore, Dongbu respectfully moves the Court to enter summary judgment in its favor, and
15 to grant it such other and further relief to which Dongbu is entitled under law or in equity.

16 Respectfully submitted this 20th day of March, 2007:

17 

18 _____
19 Thomas E. Clifford
20 Counsel for Defendant/Cross Claimant
21 Dongbu Insurance Company, Ltd.